

Chapter 3

Preparing the Record

After filing the *Notice of Appeal*, the appellant next needs to specify what items are to be in the **record** (the official account of what went on at the hearing or the trial that is now being appealed). This is called “designating the record” and must be done in every case. The record includes the reporter’s transcript and the clerk’s transcript. The **reporter’s transcript** is a word-for-word record of everything that went on during the hearings or trial; it is taken down by a certified court reporter, who then types it out (transcribes it) for the appeal. The **clerk’s transcript** can include anything that is in the superior court file—the papers that were filed, the orders that were made, the things that were done. A reporter’s transcript is optional. A clerk’s transcript or substitute is required. (The substitute can be a CRC rule 5.1 appendix or a CRC rule 5.2 stipulation to use the superior court file.)

If the superior court is going to prepare the record, the appellant needs to tell the court what items are to be included in the record within 10 days of the filing of the *Notice of Appeal*. The appellant does this by completing a *Notice Designating Record on Appeal* form (Sample F). This form shows the court whether the appellant is designating a clerk’s transcript, a CRC rule 5.1 appendix, or a rule 5.2 stipulation *and* whether a reporter’s transcript is needed. For a court-prepared clerk’s transcript and/or a reporter’s transcript, the appellant must identify the specific items to be included. What is to be included will depend on the issues the appellant is planning to talk about on appeal. These issues, in turn, will depend on which rulings the appellant believes were so wrong that the judgment or order should be overturned. The appellant needs to think about the trial, what rulings may have been wrong, and what part of the record will best tell the Court of Appeal why these rulings were wrong. These are the items the appellant should “designate for the record.”

Step 5. Getting the reporter’s transcript

What is a reporter’s transcript? The reporter’s transcript is a word-for-word typewritten record of everything that was said in court during the trial or hearing.

When is it necessary? The appellant should request a reporter’s transcript if what was said at the trial or hearing relates to the issues the appellant wants to talk about on appeal. If what was said at the trial or hearing has nothing to do with the issues for the appeal and the appellant does not want it typed up, the appellant does not need to request a reporter’s transcript.

How soon do you have to ask for it? Within 10 days of the filing of the *Notice of Appeal*, the **appeals section** of the superior court must be told whether the appellant does or does not want a reporter’s transcript.

What if the appellant is *not* requesting a reporter's transcript? The appellant should notify the **appeals section** of the superior court in writing that no reporter's transcript is needed or check the proper box on page 1 of the *Notice Designating Record on Appeal* (Sample F). This document must be served on the respondent. If the appellant does not ask for a reporter's transcript, the respondent may not ask for one, either. The Court of Appeal, however, may—on its own motion or on the motion of the respondent—order the preparation of the reporter's transcript in the interests of justice. (CRC rule 4(a)(3).)

What if the appellant is requesting a reporter's transcript? Make a list of the days, times, departments, and names of the court reporters for each day that is to be typed up (transcribed). Information on the reporters, days, times, and departments can be found in the minutes located in the Superior court file. This list must be filed with the clerk of the **appeals section** of the superior court. Page 3 of the form *Notice Designating Record on Appeal* (Sample F) may be used for this purpose. In addition, you must set out the issues that you intend to raise on appeal. (CRC rule 4(a) & 4(e).)

The *Notice Designating Record on Appeal* must be served on the respondent(s) and all known court reporters. The original must be filed with superior court **appeals section** within 10 days of the filing of the *Notice of Appeal*. It must have with it a *Proof of Service* on respondent(s) and reporter(s) and a deposit to pay for the reporter's transcripts. (CRC rule 4(a).)

If the appellant does not provide everything needed in the *Notice Designating Record on Appeal*, the superior court sends a notice to the appellant asking him or her to provide what is needed to correct the problem.

If, after being served with the appellant's *Notice Designating Record on Appeal*, the respondent wishes to designate additional parts of the transcript, a respondent's designation or *Notice Designating Record on Appeal* must be served and filed with the superior court **appeals section** within 10 days of the service of the appellant's designation. (CRC rule 4(a).)

How much does the reporter's transcript cost? The cost of the reporter's transcript depends on how many days or hours the reporter is asked to transcribe. A deposit of the transcript's approximate cost should be made at the same time the *Notice Designating Record on Appeal* is filed. (CRC rule 4(b).) The appellant can ask the reporter to give him or her a written estimate in advance. The rate is \$650 per day for each day in which there were more than three hours of proceedings, plus \$325 per day for each day in which there were less than three hours of proceedings. If the reporter's estimate does not end up covering all of the days, the appellant needs to deposit \$650 or \$325 for any day not covered. If the court reporter has given the appellant a written waiver of the deposit for fees, the appellant can submit the waiver instead of a money deposit. If the appellant has already had some or all of the proceedings transcribed, a certified copy of the transcript can be substituted for the deposit. The appellant should be sure to keep a copy of this transcript for writing the brief. The clerk should not file the *Notice Designating Record on*

Appeal unless the money deposit, the waiver of deposit, or a certified copy of the transcript is included. If the deposit runs short, the reporter contacts the appellant about how much more is needed. (CRC rule 4(b).)

Please note that a *waiver of deposit* is merely that. It waives only the need for the deposit, not the cost of the reporter's transcript. It may occur when the appellant has paid the reporter for part or all of the transcript in advance and there is no need for the deposit.

What if the appellant has no money? The appellant may apply to the superior court for a waiver of the reporter's fees. (See Sample D) You will need to fill out the *Application for Waiver of Court Fees and Costs* (Sample D). Follow the instructions provided. Waivers of reporter's transcript fees are rarely granted.

The Court of Appeal has the power only to waive its own filing fee of \$655.

How long does it take to get the transcript? Generally, it takes 30 to 60 days after the reporter is notified to get the transcript. The Court of Appeal may grant extensions of time for the reporter if he or she is unable to complete the transcript on time. (CRC rule 4(f).)

Is there a cheaper way to go? Not really. However, use of an "agreed" or "settled" statement is authorized under the CRC. The requirements are set out in CRC rules 4(g), 6, and 7(a), and are rarely used.

Step 6. The clerk's transcript

What is the clerk's transcript? The clerk's transcript is a "book" that includes copies of papers filed in the superior court case file that have to do with the issues being raised on appeal. If you ask the superior court to prepare these papers, the result is a clerk's transcript. If you prepare them yourself, the result is called an **appellant's appendix** or a **5.1 clerk's transcript** (after the CRC rule creating it). If the parties agree and the court permits, you can use the superior court file as a substitute for a clerk's transcript. Each of these options is discussed below.

What is in the clerk's transcript? The papers you designated on your *Notice Designating Record on Appeal* are arranged chronologically—that is, in the order in which they were filed in the superior court, beginning with the first papers filed in the case and ending with the last papers filed in the case. After the papers are arranged in order, they are numbered in sequence. The clerk prepares two indexes and inserts them at the beginning of the transcript. One index lists the papers in the order they were filed, and the second index lists the papers in alphabetical order. Each index includes the page numbers and, if there is more than one volume, the volume number where the papers can be found in the transcript. A cover is prepared, and everything is then bound in book form.

Who puts together the clerk's transcript? The clerk of the superior court creates the clerk's transcript. The documents to be included, as specified in CRC rule 5, must be listed (designated) on the *Notice Designating Record on Appeal* form (Sample F). The cost to the appellant depends on the number of pages and the number of volumes.

What if you want to prepare an appellant's (5.1) appendix? If the appellant does not want the superior court clerk to prepare the clerk's transcript, he or she gives notice to the superior court that he or she wants to prepare an appellant's appendix, or 5.1 appendix. Instructions for preparing the appendix are set out in CRC rule 5.1.

How do you let others know which kind of record you have selected? Prepare a *Notice Designating Record on Appeal* (Sample F). There are four choices for record preparation: (1) appendix and reporter's transcript, (2) appendix only (no reporter's transcript), (3) clerk's and reporter's transcripts, and (4) clerk's transcript only (no reporter's transcript). Check the appropriate box on the form. If you choose to have the superior court prepare a clerk's transcript, fill out page 2 of the *Notice Designating Record on Appeal*. This page is where you list the documents from the superior court file that you want included in the clerk's transcript, as described in a later section. If you choose to have a reporter's transcript prepared, fill out page 3 of the *Notice Designating Record on Appeal* as noted earlier. The original *Notice Designating Record on Appeal* is filed in the **appeals section** of the superior court. It must be accompanied by a *Proof of Service* showing that all counsel and self-represented parties were served. If a reporter's transcript has been requested, the court reporter needs to be served. (CRC rule 5.)

How soon does the notice need to be served and filed? The *Notice Designating Record on Appeal* with *Proof of Service* must be served on all counsel, self-represented parties, and reporters if a reporter's transcript has been requested. It is filed with the **appeals section** of the superior court within 10 days of the filing of the *Notice of Appeal*.

What if the respondent also wishes to designate the record? Within 10 days after the appellant has filed his or her notice designating the clerk's transcript, the respondent may serve and file a notice in superior court designating any additional documents the respondent wants included in the transcript. (CRC rule 5(a).)

Option 6a: Having the superior court prepare the clerk's transcript

How much does it cost? If the superior court is preparing the clerk's transcript, the cost depends on how many pages there are. The superior court charges a copying fee based on the number of pages designated, and a volume fee based on the number of volumes in the clerk's transcript. Unless the superior court waives appellant's

fees, the appellant should have made a \$100 deposit toward the cost of the clerk's transcript at the time he or she filed the *Notice of Appeal*. The deposit is used first. If the total cost ends up being more than \$100, the superior court gives all parties a written estimate. The appellant and any party wishing to have its own copy of the clerk's transcript must pay the cost within 10 days. A person who is unable to pay for the clerk's transcript can file with the superior court an application for a waiver of the clerk's transcript fees. (CRC rule 5(c).)

The appellant pays the entire cost of the clerk's transcript.

What happens if fees are not paid? If fees are not paid, the superior court sends a notice (called a *Notice of Default*) telling the appellant to pay within 15 days or the appeal may be dismissed. (CRC rule 8(a).) If the fees are not paid within 15 days, the superior court sends to the Court of Appeal a declaration stating that appellant has failed to cure the default. The Court of Appeal then dismisses the appeal.

How does one designate the clerk's transcript? To designate the clerk's transcript, prepare a *Notice Designating Record on Appeal*. The designation must include a list of the documents the superior court clerk is to copy for the clerk's transcript (Sample F). This list should include the exact title of each document and the date it was filed or lodged with the superior court. If the date on which the document was filed is unknown, use the date the document was signed. The appellant does not have to individually designate each jury instruction or minute order. You can list "all" jury instructions and "all" minutes.

All exhibits, whether admitted into evidence or refused, are considered part of the clerk's transcript. If some or all of the exhibits are needed in the appeal, the ones to be used are designated, and most often transmitted to the court under CRC rule 18, after the respondent's brief is filed. However, if a party wants one or more of the exhibits copied and put in the clerk's transcript to be available while the briefs are being written, the exhibits to be included must be noted by number or letter in the *Notice Designating Record on Appeal*.

Within 10 days after service of appellant's designation, the respondent may provide a list of additional items to be included in the clerk's transcript. (CRC rule 5(a).) This list must also be specific as to the title of each document and the date it was filed. After the respondent's designation is filed, or the time to file has passed, the superior court appeals clerk locates the documents listed by both the appellant and the respondent and determines the cost of preparing the clerk's transcript. The superior court appeals clerk then notifies the appellant of the estimated cost of the clerk's transcript and, upon payment, begins to prepare it. The appellant pays the entire cost even when the respondent has designated items to be included. Whether designated or not, the clerk's transcript includes:

- ▪ The Notice of Appeal;
- ▪ The judgment or order being appealed and any notice of entry;
- ▪ Any notice of intention to move for new trial, to vacate the judgment, for judgment notwithstanding the verdict, or for motion for reconsideration; and
- ▪ Any notices or stipulations to prepare the clerk's or reporter's transcripts or to proceed by agreed or settled statement (CRC rule 5(b)).

How does the respondent get the record? The respondent does not automatically get a copy of the record. If he or she wants a copy of the clerk's and/or reporter's transcript, the request must be made promptly. The superior court appeals clerk will provide the respondent with an estimate of the cost to prepare the clerk's transcript. (CRC rule 5(c).) The respondent has 10 days to pay. If the respondent wants a copy of the reporter's transcript, he or she should contact the reporter personally to arrange payment.

If the respondent does not wish to have to pay for his or her own copy, he or she may borrow the appellant's copy after notifying the appellant no more than 20 days after the record is filed in the Court of Appeal. The record is lent to the respondent when the appellant's opening brief is served, and returned to appellant when the respondent's brief is served. (CRC rule 11.)

When is the record sent to the Court of Appeal? Within 30 days after the appellant deposits money for costs or the court files an order waiving costs, the clerk's transcript should be ready. The superior court clerk should then send a copy of the transcript to the Court of Appeal and the appellant. (CRC rules 5(d), 11(a), (b))

Option 6b: Preparing an appellant's appendix

If any party elects to prepare an appendix instead of asking the superior court to prepare a clerk's transcript, the appeal proceeds by "appendix." If the other party wants a clerk's transcript, that party must file a motion in superior court contesting the choice of an appendix. The motion must be filed within 10 days after the *Notice Designating Record on Appeal* is served. (CRC rule 5.1(a).)

How much does it cost? If the appellant is preparing his or her own appendix (CRC rule 5.1), there will be copying and binding costs.

How does one designate an appellant's appendix? Within 10 days of filing the *Notice of Appeal*, the appellant must file his or her intention to proceed under "rule 5.1," along with a *Proof of Service* on each of the other parties. The appellant gives notice of his or her intention by checking a box on the first page of the *Notice Designating the Record on Appeal* form (Sample F).

What is included in a “5.1 appendix”? The appendix should include the following items:

- ▪ A chronological index of all of the items in the appendix (Sample H).
- ▪ An alphabetical index of all of the items in the appendix (Sample I).
- ▪ All documents necessary for the consideration of issues in the appeal.
- ▪ The judgment or order being appealed and any notice of its entry, any notice of intention to move for a new trial; any motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration and the rulings thereon; and any order on such motion and any notice of its entry.
- ▪ The *Notice of Appeal*; the notice to prepare the clerk’s and reporter’s transcripts, or the settled statement, or *Notice Designating Record on Appeal* form; any notice of election to proceed by an appendix under CRC rule 5.1 and, for a joint appendix, the stipulation designating its contents; any stipulation to proceed by agreed statement under CRC rule 6, along with the agreed statement; and any settled statement approved by the court under CRC rule 7.

All exhibits admitted in evidence or rejected are considered as part of the appendix even if they are not physically included in the bound volumes. (CRC rule 5.1(b).) They can later be lodged with the Court of Appeal by transmitting them under CRC rule 18.

How does one put together an appendix?

1. Make copies of the documents that are related to the appeal. Photocopy on one side only, on recycled paper.
2. Arrange the documents in the order in which they were filed in the superior court (chronologically), and number the pages one after the other, beginning with page 1.
3. Make a chronological index of all documents by listing them in the order filed, with the first page number for each document and, if there is more than one volume, the volume number. (See Sample H.)
4. Make an alphabetical index of all the documents by listing them in alphabetical order, with the first page number of each document and, if there is more than one volume, the volume number. (See Sample I.)
5. Prepare a cream-colored cover (see Sample G). The cover should state the case title and superior court case number, the Court of Appeal number, the name of each of the participating Superior court judges, the names and addresses of appellate counsel for each party or any self-represented party, the volume number, and the inclusive page numbers (for example, 1—246) of that volume. It should be titled *Appellant’s Appendix* (if prepared by the appellant), or *Joint Appendix* (if prepared jointly by appellant and respondent), *Respondent’s Appendix* (if prepared by respondent), or *Appellant’s Reply Appendix*. (CRC rule 5.1(c), 9(a), (b), (c).)

6. Put the materials together: cover, chronological index, alphabetical index, and documents in chronological order. There is a 300-page limit for each volume of a clerk's transcript.
7. Make the necessary number of copies (one for each party, one for the court, and one for yourself), and bind the original and each of the copies into transcript (book) form. The appendix should be bound on the left side, in volumes of 300 pages or less. The appendix may not be bound with the brief.

When does the appendix need to be ready? A **joint appendix** is prepared jointly by the parties, *or* the appellant and respondent may each prepare his or her own appendix. A joint appendix or an appellant's appendix must be served on the respondents and filed with the court at the same time as the appellant's opening brief. A respondent's appendix, if any, must be served on the appellants and filed with the court at the same time as the respondent's brief. An appellant's reply appendix, if any, must be served on the respondent and filed with the court at the same time as the appellant's reply brief. In filing an appendix you are certifying that the papers included are true and that correct copies of documents filed or lodged with the superior court. (CRC rule 5.1(d), (f).)

Option 6c: Using the superior court file

When can the superior court file be used in place of a clerk's transcript? If the reviewing court permits it, the parties may agree (stipulate) to use the superior court file instead of the usual clerk's transcript by filing, the stipulation in the **appeals section** of the superior court within 10 days of filing the *Notice of Appeal*. The Court of Appeal in Fresno permits the use of the superior court file. The appellant and respondent must both sign the stipulation to use the superior court case file. (CRC rule 5.2(a).)

Within 10 days of filing the stipulation, the superior court will notify you of how much it will cost to put the file in chronological order, number the pages, and prepare a chronological index. You must pay within 10 days of receiving the estimate.

If the parties stipulate to use the superior court file instead of the clerk's transcript, the superior court file is sent to the Court of Appeal. The appellant and respondent will receive only an index of the documents in the file. (CRC rule 5.2(a), (b).)

Record problems

What happens if you do not pay costs on time? If you have not made the required payments, the superior court will notify you by sending you a notice of default.

What is a notice of default? A notice of default says that someone did not do what the CRC said to do. Generally something was not done on time or was done incorrectly. The notice gives the responsible person a certain number of days from the date of the notice to do what needs to be done. Notices may be sent by the

superior court or the Court of Appeal, depending on what the problem is. Examples of defaults in the superior court having to do with record preparation are: failing to file a *Notice Designating Record on Appeal*, failing to pay the costs of the clerk's and/or reporter's transcript, and failing to correct the designation after notice was sent to the party by the superior court. (CRC rule 8.)

What if the default is not corrected? A party has 15 days from the date of the notice to resolve the problem. If the things to be fixed are still unresolved after the 15 days, the superior court sends a declaration to the Court of Appeal stating the party has failed to cure the default. If the appellant is the party who has not complied with the rules, the appeal may be dismissed by the Court of Appeal; if the respondent is the party that has not complied on time, the appeal may go forward on the appellant's record alone. (CRC rule 8(b).)

What if something is missing from the record? In working with the record, a party may discover things that are missing or things that were overlooked in the designation or in the preparation of the clerk's transcript. If the clerk or reporter omitted a required or requested item, serve on the parties and file in the superior court a *Notice of Correction* requesting that the omitted matter be prepared and sent to the Court of Appeal. (CRC rule 12(b).) If the item was not listed in the designation of record, a motion to augment will be needed. (See the section on motions in Chapter 6.)

Filings in the Court of Appeal and the superior court can be made in person or by mail. See Appendix 2 for addresses.

**After the record is filed in the Court of Appeal,
everything filed with the Court of Appeal must be
accompanied by a *Proof of Service*.**